BHSF
13.15.1.2
6-9-03

June 9, 2003

Reply To
Attn Of: ORC-158

MEMORANDUM

SUBJECT: STATEMENT OF POSITION UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

FROM: Ted Yackulic
Assistant Regional Counsel

TO: Michael F. Gearheard
Director, Office of Environmental Cleanup

INTRODUCTION

This Statement of Position (Statement) of the United States Environmental Protection Agency (EPA) responds to the Statement of Position that Hecla Mining Company (Hecla) served on EPA on May 27, 2003. In its statement, Hecla essentially argues that because Hecla has asked the United States District Court for the District of Idaho to modify the terms of the Bunker Hill Populated Areas Consent Decree (Box Consent Decree), Hecla need not perform all of the Work required by the Box Consent Decree during the 2003 construction season, and that EPA and the Idaho Department of Environmental Quality (IDEQ) may not perform any of the 2003 Work. The Box Consent Decree is Attachment 1 to this Statement.

The Dispute

On May 27, 2003, Hecla triggered the dispute resolution procedures of the Box Consent Decree. The Box Consent Decree was entered into by and between, among others, the United States and the State of Idaho (collectively the "Plaintiffs"), and Hecla and ASARCO, Inc. (ASARCO) (collectively the "Settling Defendants" or the "Defendants"). Hecla's Statement of Position disputes two EPA and Idaho Department of Environmental Quality (IDEQ) decisions.

Hecla first disputes EPA's and IDEQ's April 18, 2003 decision to partially approve and partially disapprove Hecla's Work Plan for the 2003 construction season (Work Plan). In this decision, EPA and IDEQ approved Hecla's proposal to spend $1 million to remediate approximately 18 residential properties in

the Populated Areas, fund the Institutional Control Program (ICP), and fund IDEQ oversight during 2003. EPA and IDEQ disapproved Hecla's Work Plan to the extent that Hecla failed to meet the remainder of its Box Consent Decree annual cleanup requirements, which include remediating 200 yards, addressing water well closures, remediating rights-of-way (ROWs) and commercial properties, and conducting other work outlined in the Remedial Design Reports. EPA and IDEQ, also, by this decision, directed Hecla to modify its Work Plan to provide for the remediation of 100 residential yards (including high risk yards) plus associated ROWs and commercial properties in the City of Wardner. Hecla disputes the directive to modify its Work Plan.

Hecla also disputes EPA's and IDEQ's April 30, 2003 decision to assume the remediation of a minimum of 100 residential yards, ROWs and commercial properties. EPA and IDEQ notified Hecla of this decision after Hecla failed to modify its Work Plan as directed by the April 18, 2003 decision.

Thus, by refusing to perform all of the Work required by the Box Consent Decree and by objecting to Plaintiffs' decision to perform such Work, Hecla maintains that the only cleanup work which can be performed this year is the cleanup work that it proposed in its Work Plan. Presumably, Hecla is preparing to implement its Work Plan during this construction season.

The Box Consent Decree

The Box Consent Decree provides the terms and conditions of Hecla's and ASARCO's agreement with the United States and the State of Idaho relating to Operable Units 1 and 2 of the Bunker Hill Superfund, the Populated and Non-Populated Areas of the Site. Among other things, the Box Consent Decree describes Settling Defendantss' Work obligations, EPA authority to approve submittals, EPA's authority to assume Work, the ability of Settling Defendants to dispute an EPA decision, and dispute resolution procedures, including the standard of review of such a dispute.

The Box Consent Decree requires Settling Defendants to perform cleanup work each construction season until the remedial actions have been fully performed and performance standards have been met. See, Bunker Hill Remedial Design and Remedial Action Area 1 Statement of Work (SOW) at § 5.1., and Paragraphs 16 and 51 of the Box Consent Decree. The Box Consent Decree requires Settling Defendants to remediate a minimum of 200 residential yards as well as associated ROWs and commercial properties associated each construction season. In addition, the Box

Consent Decree obligates Settling Defendants to fund both the ICP program and IDEQ oversight, to address water well closures, and to close Page Pond[1]. Paragraph 7.f of the Box Consent Decree clearly states that Settling Defendants are jointly and severally obligated to perform these activities. Thus, the inability of one Settling Defendant to contribute to the performance of these activities because of its insolvency or other failure, does not excuse or lessen the other Settling Defendants' obligation to perform them. See, Paragraph 7.f.

The Box Consent Decree requires Settling Defendants to submit a Work Plan on April 15 of each year. See, SOW at §§ 3.4 & 5.1. The Work Plan is subject to approval by EPA. Id. Paragraph 39 of the Box Consent Decree articulates EPA's authority when reviewing a submission that requires its approval. In relevant part, Paragraph 39 provides the following:

> After review of any plan . . . required to be submitted for approval . . . EPA, after reasonable opportunity for review and comment by the State shall: (a) approve, in whole or part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or part, the submission directing that the Settling Defendants modify the submission; or (e) any combination of the above.

In the event that EPA provides the Settling Defendants with a notice of disapproval, Paragraph 41.a of the Box Consent Decree requires the Settling Defendants to correct the deficiencies and resubmit the plan to EPA for approval within fourteen days of receipt of the notice of disapproval. Paragraph 41.b expressly requires the Settling Defendants to implement the approved portions of a submittal that has otherwise been disapproved.

The Box Consent Decree provides EPA with authority to take over Work. EPA may exercise this authority if it first determines that the Settling Defendants have failed to implement any provision of the Work in an adequate or timely manner. See, Paragraph 91 of the Box Consent Decree.

Should any Settling Defendant, disagree with an EPA

---

[1]The Box Consent Decree obligates Settling Defendants to perform additional cleanup activities on an annual basis. These activities may be found in the Box Consent Decree, SOW, and Remedial Design Reports (RDRs). The SOW is attached as Attachment 2 to this Statement.

decision, it may dispute the decision pursuant to the terms and conditions of Section XX of the Box Consent Decree. The Decree provides that, in the first instance, that dispute will be subject to the informal negotiations of the parties to the dispute. See Paragraph 67 of the Box Consent Decree. In the event that informal negotiations are unsuccessful, EPA's dispute position is binding unless the Settling Defendant triggers the formal dispute resolution procedures. See, Paragraph 68.a of the Box Consent Decree. This is done by filing a Statement of Position with EPA. Id. The Statement of Position should include the factual data, analysis or opinion supporting the position as well supporting documentation and whether the dispute resolution should proceed under Paragraph 69 or 70 of the Box Consent Decree. Id. Paragraph 69 involves, among others, all disputes pertaining to the selection or adequacy of any response actions. See, Paragraph 69.a of the Box Consent Decree. The Box Consent Decree expressly treats a dispute concerning EPA's review of a submittal or the adequacy of the performance of a response action as disputes pertaining to the selection or adequacy of any response action. Id. The Settling Defendant disputing an EPA decision pertaining to the selection or adequacy of any response action has the burden of demonstrating that the EPA decision is arbitrary and capricious or otherwise not in accordance with the law. See Paragraph 69.

Court Orders on Motion to Modify

As previously noted, Settling Defendants have petitioned the District Court to modify the Box Consent Decree. Settling Defendants filed their original petition on January 16, 2001. By Order of September 30, 2001, the District Court granted in part and denied in part their motion. The Court indicated in its Order that it would conduct further hearing on this matter after the Record of Decision on the Basin RI/FS is completed[2]. By Order of October 15, 2001[3], the Court clarified its earlier Order and expressly ruled that "the Settling Defendants shall fully comply with obligations under the Box Consent Decree until further order of this Court." Settling Defendants renewed their motion to modify by filing a Request for Relief on Motion to Modify Box Consent Decree on April 1, 2003.[4] The United States

[2]A copy of this Order is attachment 3 to this Statement.

[3]Attachment 4 to this Statement.

[4]Attachment 5 to this Statement.

and the State of Idaho have responded to this motion[5]. The Court has taken the matter under its consideration.

Arizona Consent Decree

In early February of this year the United States District Court for the District of Arizona entered a consent decree that resolved the outstanding complaint that the United States had filed against ASARCO and its subsidiary Southern Peru Holdings Corporation (the "Arizona Decree"). That complaint alleged, inter alia, that ASARCO was intending to sell its stock-ownership interest in the Southern Peru Copper Corporation ("SPCC") to ASARCO's parent corporation (Americas Mining Corporation or "AMC") for substantially less than the stock's reasonably equivalent value. The United States sought preliminary and permanent injunctions that would have enjoined ASARCO from proceeding with that transaction under the terms originally proposed.

The result of that action was a settlement wherein AMC agreed to pay over $100 million in additional consideration for that stock. The primary additional value was a $100 million promissory note from AMC to ASARCO. The settlement also required that the $100 million promissory note be assigned to an independent Environmental Trust established by ASARCO. That Trust was established and is controlled by an independent Trustee. Under the terms of that promissory note, AMC is to make annual payments of $12.5 million in principal reduction, plus accumulated interest.

The Trust has been established for the sole purpose of funding environmental response work at Sites where ASARCO is potentially liable. The assets of the Trust can only be used for the funding of future work or response costs. The Decree and Trust Agreement specify the types of costs and Sites for which Trust funds are available, and describe an annual budgeting process for allocation of Trust funds each year. The Annual Budget for 2003 has been jointly submitted to and approved by the Trustee. Under the terms of that budget the Trust will pay $1.5 million to be used to help fund the work that Plaintiffs intend to perform as a result of Hecla's refusal to perform the Work required under the terms of the Box Consent Decree and Plaintiffs related decision to assume a significant portion of that work. Finally, as part of the Arizona Decree,

---

[5] Attachment 6 to this Statement.

the United States agreed to a three-year enforcement forbearance period. Specifically, the United States will not compel ASARCO to incur Environmental Response costs over and above funds available from the Trust during 2003 - 2005 beyond specified amounts. In 2003, the United States can only compel ASARCO to spend $2 million over and above Trust funding, $2.5 million in 2004, and $3 million in 2005.

Argument

EPA's Decision to Partially Disapprove Hecla's Work Plan and Direct Hecla to Perform Less Work than the Consent Decree Requires and EPA's Decision to Perform the At Least Half of This Year's Work Is Well Within Its Consent Decree Authority.

The Box Consent Decree cleanup obligations are the joint and several obligation of Hecla and ASARCO. If ASARCO fails to perform any remedial action during the 2003 construction season, Hecla remains obligated by the terms of the Box Consent Decree to perform the 2003 remedial action.

The Box Consent Decree requires Settling Defendants to, among other things, remediate at least 200 residential yards plus associated ROWs and commercial properties as well as fund the ICP and IDEQ oversight during the 2003 construction season. Hecla's 2003 Work Plan proposed to remediate approximately 18 residential yards, including high risk yards, and to fund the ICP and IDEQ oversight. Hecla's Work Plan is woefully deficient when compared to the Box Consent Decree obligations. Implementation of the Hecla Work Plan would result in the performance of less than 10 percent of the 200 residential yards that the Box Consent Decree requires. Clearly, EPA acted within its authority when it partially disapproved Hecla's Work Plan and directed Hecla to modify its Work Plan. This is especially the case since EPA directed Hecla to meet only half of its annual Work obligations. Moreover, EPA considered the appropriate and relevant factors when making its decision. These factors included: the limited nature of Hecla's Work Plan, Hecla's public disclosures concerning its financial capability, the legal obligations established by the Box Consent Decree, the Arizona Consent Decree, as well as the Plaintiffs' ability to fund Work. There is a rational connection between these factors and EPA's decision; EPA's decision is not arbitrary and capricious[6].

---

[6]The Ninth Circuit confirmed its interpretation of the arbitrary, capricious, an abuse of discretion, or not in accordance with law standard of review for agency actions in a

A similar analysis applies to EPA's decision to assume a portion of this season's Work. Hecla's Work Plan proposed to perform less than 10 percent of the required Work this year. EPA directed Hecla to modify its Work Plan to provide for performance of half of this year's Work and provided Hecla with an opportunity to modify its deficient Work Plan. Hecla did not modify its Work Plan. Consequently, EPA assumed a portion of this year's Work. Had EPA failed to take over this Work, there would be no assurance that even half of this year's Work would be performed. EPA considered the same relevant factors in making this decision as it did when directing Hecla to modify its Work Plan. In addition, EPA considered the time it needed to contract and plan for the assumed Work. The nexus between these factors and EPA's decision to take over Work is clear. EPA's decision was not arbitrary and capricious.

Neither Hecla's Request for Relief, the Arizona Consent Decree, Nor the Amount Allocated from the ASARCO Environmental Trust to Box Consent Decree Work Excuses Hecla's Non-Compliance With the Box Consent Decree

Hecla attempts to support its position with three arguments. First, Hecla argues that because it has requested that its Request for Relief is before the Court, Hecla need not satisfy the Box Consent Decree obligations. Second, Hecla argues that the United States' receipt of funds from ASARCO pursuant to the Arizona Consent Decree violates the Box Consent Decree, and thus, excuses Hecla's non-compliance. Third, Hecla argues that its contribution to the Box Consent Decree work should be no greater than ASARCO's and to require it to spend more on Box Consent Decree work than ASARCO this year is "patently unfair."

Hecla's first argument neither excuses its failure to submit

---

case involving the Resource Conservation and Recovery Act, System Environmental Corp. v. U.S. E.P.A, 55 F.3d 1466 (9th Cir. 1995). In this case, the Ninth Circuit determined that this standard requires a court to uphold an agency action if the evidence before the agency provides a rational and ample basis for the decision, 55 F.3d at 1469. In reaching this conclusion, the Ninth Circuit relied on the analysis provided in Northwest Motorcycle Association v. U.S. Department of Interior, 18 F.3d 1468 (9th Cir. 1994). In Northwest Motorcycle Association, the arbitrary, capricious standard was further described as requiring a court to determine whether the agency considered all of the relevant factors and whether there was a clear error of judgement, 18 F.3d at 1471. There is no clear error of judgement if there is a rational connection between the relevant facts and the agency action, id.

an adequate 2003 Work Plan nor prevents EPA and the State from performing Box Consent Decree Work this year. Hecla's argument makes no sense legally, equitably or logically. As previously noted, by its Order of October 15, 2001, the Court expressly ruled that "the Settling Defendants shall fully comply with obligations under the Box Consent Decree until further order of this Court." Thus, Hecla's position is inconsistent with the clear direction of the Court. Secondly, it was Hecla's decision to wait until the eve of the construction season to approach the Court and seek relief. If Hecla had wanted this motion addressed before its duties under the Box Consent Decree commenced in 2003, it could have brought its Request For Final Relief much earlier. For example, Hecla could have made its request soon after EPA issued the Record of Decision for the Basin on September 12, 2002. This would have been consistent with the Court's Order of September 30, 2001. Hecla cannot now allege that it is unfair or inequitable for EPA and IDEQ to proceed with enforcement of the Box Consent Decree because the Court has not yet ruled on its eleventh hour request. Whatever harm Hecla may incur by performing half of this season's Work as directed by EPA, is harm it could have prevented by bringing its Request for Relief earlier. Finally, Hecla's position is illogical in that it effectively asserts that EPA should neither direct Hecla to comply with the Box Consent Decree nor perform any Work until that motion is resolved. This would simply freeze cleanup work at the Site in its tracks. This cleanup is occurring within several communities and has been ongoing for more than a decade. Cessation of Work will delay the attainment of performance standards and unnecessarily prolong exposure to the human health risks that the cleanup is intended to prevent. The last thing these communities need or want is this cleanup being delayed[7].

Hecla's next argument is as specious as its first. Hecla is mistaken when it suggests that the Arizona Consent Decree takes funds away from cleanup. On the contrary, the United States will apply funds from the Environmental Trust to cleanup in accordance with the terms and conditions of the Arizona Consent Decree. Given ASARCO's strained financial condition, the Arizona Consent Decree may very well result in more ASARCO money being spent on cleanup this year than would have been spent absent the Arizona Consent Decree. In any event, expenditures from the ASARCO Environmental Trust at the Site will reduce both ASARCO's and Hecla's Box Consent Decree liabilities.

In practical terms, EPA's decisions have lessened Hecla's Work commitment to the United States while not changing Hecla's commitment in its sidebar agreement with ASARCO. Basically,

---

[7]Attachment 7 to this Statement is a full page advertisement that ran in the Spokane Spokesmen Review on May 27, 2003.

EPA's and IDEQ's contested decisions split this year's Work into two equal parts. If these decisions are implemented, 50 percent of the Work will be performed by EPA and IDEQ and the other 50 percent will be performed by Hecla. EPA and IDEQ will fund their performance with a combination of Superfund monies, State monies, and ASARCO Environmental Trust monies. Hence, Hecla need only fund 50 percent of the this year's Work. As Hecla freely admits this 50/50 split comports with the funding arrangement between Hecla and ASARCO for performing Box Consent Decree Work. See, Hecla Statement at p. 2.

Hecla vaguely suggests that EPA's use of funds from the ASARCO Environmental Trust somehow appropriates funds from Hecla and ASARCO and, consequently, modifies the Box Consent Decree. Hecla's cites to no particular sentence, paragraph, or section of the Box Consent Decree that is modified to support this conclusion. Absent any support or argument, this arguments must be dismissed.

EPA and the IDEQ have assumed a portion of this season's Work that the Settling Defendants are required to perform. The Plaintiffs' assumption of Work is well within the authority provided them via the Box Consent Decree. In addition, the Work take over does not result from application of the Arizona Consent Decree. It results from Hecla's failure to submit a Work Plan that would comply with its Consent Decree obligations. The fact that we are seeking different things - Work from Hecla and funding from ASARCO -- is not arbitrary and capricious. It is perfectly reasonable in light of the circumstances faced by EPA and IDEQ.

Hecla's last argument is that it is unfair for it to spend more money than ASARCO on this year's Box Consent Decree Work. Hecla cites no law or legal argument to support this proposition. On the contrary, the Box Consent Decree obligations are joint and several and the United States may use its prosecutorial discretion when choosing whom it should enforce the terms of the Box Consent Decree. Second, ASARCO is experiencing financial difficulties. This factor alone merits different treatment. Yet, Hecla fails to contest this issue either by showing that ASARCO can afford to do more or by demonstrating that it cannot perform more than it has proposed. In addition, there is no guarantee that the payments by these parties towards this year's Box Consent Decree Work will prove to be anything other than 50-50. The United States, in the Arizona Consent Decree, reserves its claims against ASARCO for all Superfund money the United States may expend at the Site as a result of the Work take over. Plus, nothing alters Hecla's rights to pursue any contribution or contract claims Hecla may have against ASARCO. Merely because EPA did not direct ASARCO to actually perform 50 percent of the work this season as well does not mean ASARCO will not ultimately

have to equally share such costs with Hecla.

Lastly, Hecla's third argument rests on the irrelevant assumption that Hecla performs Work more cost effectively than EPA and IDEQ. Given that the central point of Hecla's dispute is its reluctance to perform the 2003 Work, this argument is wholly inappropriate. Because Hecla is unwilling to fully perform under the Box Consent Decree, EPA and IDEQ must incur clean-up costs regardless of who maintains the cheaper work force. EPA would rather not be doing any work, but so long as it is required to do work, there is nothing surprising or unfair about the fact it will use money from the Trust to defray the expense of performing that work.

Conclusion

For the foregoing reasons, EPA respectfully request that Hecla's challenge to EPA's decisions be denied and that Hecla be directed to comply with these decisions.